United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,553
(Criminal 432-65)

267

ROBERT WALTER, JR.,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether it was error to deny a motion for acquittal of second degree murder where the defendant testified that the shooting was unintentional, and the contrary testimony of the prosecution's witness was incredible on its face in that it was at odds with the physical evidence and inconsistent with admitted fact.

2. Whether, where the defense depends on defendant's testimony that killing was unintentional and he says his thinking at the time was "clear," instructions are plainly erroneous which (a) tell the jury that to reduce the conviction to manslaughter they must find "heat of passion" and (b) fail to state the law respecting unintentional killing as involuntary manslaughter.

3. Whether instructions on excusable homicide, prepared by the court, are plainly erroneous when they do not mention criminal negligence but tell the jury that ordinary negligence may give rise to criminal homicide, and further characterize excusable homicide as a "defense."

4. Whether exclusion from the jury selected to try a first degree murder indictment of all prospective jurors opposed to capital punishment was plain error, depriving a defendant convicted of second degree murder of a Constitutional right to have his guilt or innocence determined by a jury "fairly representative of the community."

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted for murder in the first degree, in violation of Section 22-2401, D.C. Code. The District Court had jurisdiction under Section 11-521(a)(2), D.C. Code. This Court has appellate jurisdiction under Section 1291 of the Judicial Code, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Robert Walter, Jr.*/ appeals to this Court from a District Court judgment sentencing him to imprisonment for a period of five years to twenty years. Appellant was tried under an indictment for murder in the first degree. The District Court entered its judgment upon the jury's verdict that Appellant was guilty of second degree murder. The case arises from the death, by gunshot wound, of George Robert Tarrant, Sr. Death occurred in a domestic setting.

In May 1964, Appellant, then separated from his wife, met Reva Tarrant, daughter of George Robert Tarrant, Sr., at the apartment of mutual friends. (Tr. 201.)**/ Appellant became acquainted with Mr. Tarrant Sr., the father, at approximately the same time. (Tr. 202.)

The Tarrants lived in an apartment on 18th Street. Residing with Mr. Tarrant Sr. were his son, George Robert Tarrant, Jr., Reva, and his infant grandson, Reva's child. (Tr. 54, 200.)

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*/ Appellant actually spells his name "Walters," with an s. For consistency with the Transcript and other parts of the record, he is referred to as "Walter" in this brief.

**/ "Tr." refers to the Transcript of Proceedings in the District Court. The Additional Transcript of Proceedings, containing voir dire, opening statements, closing arguments, and discussion of instructions, is cited as "A Tr."

Reva and Appellant formed an intimate relationship, and in June 1964 Appellant moved from a rooming house he operated to the Tarrant apartment. (Tr. 202.) Mr. Tarrant Sr. got along well with Appellant. (Tr. 50, 134-135, 203, 205-206.)

Toward the end of 1964, the group decided to move. Mr. Tarrant Sr. had asked his sister, Mrs. Inez Richardson, to join the household (Tr. 45) and the 18th Street apartment, which was in bad condition, seemed too small (Tr. 204). Besides, the rent was unpaid. (Tr. 204.)

Mr. Tarrant Sr. located an apartment on Lanier Place, available for sublease, and asked Appellant to pay the first month's rent. (Tr. 204, 208.) Appellant did so, and also provided the apartment's meagre furniture. (Tr. 208-209.) In mid-January 1965, the entire household moved to Lanier Place - Mr. Tarrant Sr., Tarrant Jr., Reva, Reva's child, Mrs. Richardson, Mrs. Richardson's three-year old grandchild, and Appellant. (Tr. 5, 8, 200.)

On Saturday, January 30, 1965, Appellant called at the home of a niece of Mr. Tarrant Sr.'s, and spent some three hours there, talking and drinking with one Louis Hairston, who lived with the niece. (Tr. 210, 220.) Hairston asked Appellant for the loan of $5.00. When Appellant demurred, Hairston offered collateral - an automatic pistol and a clip of cartridges. (Tr.

210, 220, 236.) Appellant made the loan, put the collateral in his pocket, and returned to his apartment. (Tr. 210, 221.)

Appellant went out again, and on his way back to Hairston's, he met Joseph L. Hardison at 17th Street and Florida Avenue. Appellant and Hardison went to the home of Hardison's sister-in-law on U Street. (Tr. 124, 224.) Hardison there saw the gun. (Tr. 125, 224.) Appellant had the gun with him because he had expected Hairston to repay the $5.00 and take back the gun, later the same afternoon. (Tr. 246-247.) After more drinking, Appellant and Hardison took a bus to go to Lanier Place. (Tr. 127, 128, 227.) They were on their way to Appellant's apartment to get money, as Hardison had asked Appellant for the loan of $20. (Tr. 224-225.)

The time was about 9 p.m. or somewhat later. (Tr. 126, 225.) Hardison and Appellant both testified that Hardison then had the gun. (Tr. 126, 225.) Appellant testified that Hardison took it on the theory that Appellant might be picked up by the police on a drunk charge, be taken into custody if found with a weapon, and become unavailable as money-lender. (Tr. 225, 249.) The gun was not loaded: The cartridge clip was separate from the gun when Appellant received them from Hairston (Tr. 210), and the gun and the clip remained separate. (Tr. 221, 225.) Hardison's testimony confirmed this fact. (Tr. 126.) Appellant said he gave Hardison the clip as well

as the gun (Tr. 225, 251); Hardison said he took only the gun (Tr. 126).

Between the bus stop and Appellant's building, he and Hardison met Reva. (Tr. 136, 227.) Reva and Appellant talked briefly, perhaps argued. (Tr. 136, 228.) Reva went upstairs to the fourth-floor apartment. (Tr. 136, 228.) Appellant followed (Tr. 136, 228), and Hardison, then or later, went up as far as the fourth-floor landing (Tr. 137, 228).

Appellant, who did not carry a key (Tr. 58), knocked at the door and was admitted by Tarrant Jr. (Tr. 17, 228). Appellant asked for Reva (Tr. 87, 228). Told she was in the bathroom, at the rear of the apartment, he started down the hall in that direction. (Tr. 228.)

Mr. Tarrant Sr. went into the hall and stood facing Appellant, blocking his way. (Tr. 87, 228.)*/ He ordered Appellant away from Reva. (Tr. 19, 87, 228.)**/ He made the statement that Reva was only 16, which Appellant refused to believe. (Tr. 228-229.) The two men engaged in struggle which Mr. Tarrant Sr. won.

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*/ Mrs. Richardson testified that before Mr. Tarrant Sr. accosted Appellant, there was a quarrel between Appellant and Reva. (Tr. 17-19.) Her testimony on this point was contradicted not only by Appellant (Tr. 228), but by Tarrant Jr., the other eyewitness (Tr. 87).

**/ As the prosecution noted in closing argument, "It may be that he decided somewhat late in the game to get angry about Mr. Walter and Reva." (A Tr. 101.)

(Tr. 19, 65, 229, 258.) Mr. Tarrant Sr. "had [Appellant] down on the floor" (Tr. 65, 88). Tarrant Jr. then stepped up and shattered a Coca Cola bottle against Appellant's head (Tr. 20, 88, 229). Mr. Tarrant Sr. dragged the unconscious or semi-conscious Appellant out of the apartment and into the building hall (Tr. 20, 66-67, 259), where he kicked and punched him (Tr. 130-131, 230, 259).

Joseph L. Hardison - the man carrying the gun - was at this time in the fourth-floor hall, and he now pulled Mr. Tarrant Sr. away from Appellant. (Tr. 131, 139.) Mr. Tarrant Sr. went back into the apartment, and Mrs. Richardson locked the door. (Tr. 22.)

Appellant got the gun from Hardison. (Tr. 89, 131, 231.) Hardison ran out. (Tr. 142.) Appellant went to the locked apartment door, knocked, and when there was no answer kicked it. (Tr. 231.) The door burst or flew open. (Tr. 24, 231.) Appellant went in. (Tr. 231.)

At this time Tarrant Jr. was somewhere on the stairs (Tr. 90), and Reva was outside the building (Tr. 90, 118). Thus three adults were in the apartment: Mr. Tarrant Sr., Mrs. Richardson, and Appellant. Mrs. Richardson and Appellant testified as to the circumstances of the death of Mr. Tarrant Sr.

Appellant testified that he returned to the apartment because he wanted to "go home" to attend to his injuries, to

change his coat, which was stained with his own blood, and to pick up his money. (Tr. 261.) He took the gun because it was his "passport"; because, he said, "I figured if he [Mr. Tarrant Sr.] saw it he wouldn't bother me." (Tr. 261.) "I had the gun so they could see it, so I could see about myself." (Tr. 265.)

Appellant testified that as he entered the apartment, he had the gun pointed up, toward the ceiling. (Tr. 265, 266.) He did not know it was loaded. (Tr. 263, 269.) Mr. Tarrant Sr. came into the apartment hall, toward Appellant, carrying a stick. (Tr. 231, 265.) As Mr. Tarrant Sr. approached, Appellant raised the gun higher, to keep it out of his reach. (Tr. 265.) With his left hand, Appellant grasped Mr. Tarrant Sr.'s right hand, the one holding the stick. (Tr. 231.) Mr. Tarrant Sr., who was taller than Appellant, reached up and seized the barrel of the gun with his left hand. (Tr. 231, 265, 266.) Mr. Tarrant Sr. began twisting the gun. (Tr. 231.) It fired, wounding Appellant in the left arm. (Tr. 188, 266.) It fired again and Mr. Tarrant Sr. fell, bleeding from the mouth. (Tr. 266-267.) At no time had Appellant squeezed the trigger. (Tr. 266.)

Mrs. Richardson testified that when the door flew open, Mr. Tarrant Sr. stepped into the apartment hall. Mrs. Richardson denied seeing a stick. (Tr. 278.) Then, she said, "he [Mr. Tarrant Sr.] turned and when he turned Robert shot him - Robert Walter shot him." (Tr. 24.) Mr. Tarrant Sr.

threw his arms around Appellant's chest (Tr. 26), blood gushing from his mouth. (Tr. 82.) Appellant's hands were raised over his head and in his right hand was a pistol. (Tr. 27.) Mrs. Richardson ran out the door, remembered her grandchild, came back for the child, ran out again, and as she ran out the second time, heard the second shot. (Tr. 28.)

According to Mrs. Richardson, when Mr. Tarrant Sr. was shot, he was an arm's length away from Appellant (Tr. 77), and she was standing "right behind" Mr. Tarrant Sr. (Tr. 78.) She said that Mr. Tarrant Sr. did not seize the gun and did not touch Appellant until after the first shot. (Tr. 77, 278.)

The Metropolitan Police arrested Appellant early in the morning of January 31, 1965, at a hospital where he had gone for treatment of his wounds. (Tr. 188.) According to the docket of the court, he was indicted for first degree murder on April 20, 1965; arraigned on April 22, 1965; tried on September 7, 8, 11, 12 and 13, 1967; convicted on September 13, 1967; and sentenced on October 27, 1967. Except for one period after conviction, Appellant has been continuously free on bond since his arraignment.

STATUTES INVOLVED

D.C. Code, § 22-2403:

> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402 [defining murder in the first degree], kills another, is

guilty of murder in the second degree."

D.C. Code, § 22-2404 (in part):

"The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment."

D.C. Code, § 22-2405:

"Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment."

STATEMENT OF POINTS

1. The District Court erred in denying Appellant's motion for judgment of acquittal as to second degree murder.

2. The District Court's failure to instruct the jury on involuntary manslaughter was plain error.

3. The District Court's instructions to the jury on excusable homicide were plainly erroneous.

4. The District Court's exclusion from the jury of all prospective jurors who stated opposition to capital punishment was contrary to a decision of this Court and incorrect under the Fifth and Sixth Amendments of the United States Constitution.

SUMMARY OF ARGUMENT

Appellant based his defense in the court below on the plea that the shooting of the decedent was entirely unintentional and an accident. Appellant testified that his intent in taking a pistol with him into his apartment was to display it and keep the decedent, who had just given him a severe beating, at his distance. Appellant testified that when decedent confronted him, he had the gun pointed toward the ceiling and was holding it as high as he could, to keep it out of decedent's reach. Decedent, a taller man, grasped the gun barrel and twisted. As he did so, the gun fired twice, the first shot hitting Appellant and the second hitting the decedent. Appellant testified that he did not squeeze the trigger.

The decedent's sister testified, for the United States, that she witnessed the death and that Appellant shot the decedent deliberately. But her testimony, at odds with the physical evidence and inconsistent with the admitted fact that two shots were fired, is incredible on its face. A reasonable juror could not accept it as establishing malice aforethought beyond a reasonable doubt. Appellant's motion for a judgment of acquittal as to second degree murder should have been granted. Rule 29(a), Federal Rules of Criminal Procedure; Austin v. United States, _____ U.S. App. D.C. _____, 382 F.2d 129, 138 (1967).

In any event, Appellant was entitled to have the court submit to the jury all issues arising from the evidence, including evidence which was contradicted. Stevenson v. United States, 162 U.S. 313, 314 (1896). Appellant testified that he had no intent to kill or injure anyone. Unintentional killing, if criminal at all, may be involuntary manslaughter. United States v. Pardee, 368 F.2d 368 (4th Cir. 1966); 1 Wharton's Criminal Law 614-615. (Anderson ed. 1957.) Thus the question for the jury was whether or not there had been an unintentional killing resulting from an unlawful act either in its nature dangerous to life or constituting criminal negligence. But this question was not submitted to the jury. The court's instructions defined only voluntary manslaughter; and the court told the jury that murder would be reduced to manslaughter only if they found "heat of passion." The jury convicted Appellant of murder. Involuntary manslaughter was an essential question in the case, and failure to instruct on involuntary manslaughter was plain error within the meaning of Rule 52(b), Federal Rules of Criminal Procedure. Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951).

The trial court's instruction on excusable homicide was also plainly erroneous. The court told the jury that Appellant's conduct was criminal if death resulted from ordinary negligence. The court gave no charge with respect to the degree

of negligence which constitutes criminal negligence and no charge defining the type of unlawful act which will support an involuntary manslaughter conviction. See United States v. Pardee, 368 F.2d 368 (4th Cir. 1966). Moreover, the trial court erred in telling the jury that excusable homicide is a "defense." The court should have instructed the jury to acquit unless the United States proved beyond a reasonable doubt that decedent's death was not the result of accident or misadventure.

Finally, during voir dire the trial court excused all prospective jurors who stated opposition to capital punishment. The trial court's questioning did not make a distinction between opposition to capital punishment and ability to render an impartial verdict as to guilt or innocence. This was error under Long v. United States, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966). It deprived Appellant of a jury "fairly representative of the community," contrary to the Constitution. Crawford v. Bounds, _____ F.2d _____ (4th Cir., No. 10,981, April 11, 1968).

ARGUMENT

I. DENIAL OF APPELLANT'S MOTION FOR ACQUITTAL OF SECOND DEGREE MURDER WAS ERROR

(With respect to Point I, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 19-28, 58, 66, 80, 177-180, 183, 188, 228-232, 234-235, 246-247, 250-251, 257-266.)

At the close of all the evidence, Appellant moved for a judgment of acquittal as to first degree murder and as to second degree murder. (A Tr. 61.) See Rule 29(a), Federal Rules of Criminal Procedure. The trial court denied both branches of the motion. (A Tr. 70.) In view of the jury's verdict (guilty of second degree murder), denial of the motion as to first degree murder need not be considered. But as to second degree murder, of which Appellant was convicted, denial of the motion was obviously crucial.

In Austin v. United States, _____ U.S. App. D.C. _____, 382 F.2d 129, 138 (1967), this Court stated the test applicable to motions for acquittal as follows:

> "A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime."

Malice aforethought is an essential element of the crime of second degree murder. D.C. Code, § 22-2403. To

sustain a conviction of murder, the United States must prove beyond a reasonable doubt that the killing of a human being was the result of a willful and malicious act. Hansborough v. United States, 113 U.S. App. D.C. 392, 394, 308 F.2d 645, 647 (1962).

Appellant testified in the court below that he had no intention whatever to kill or injure. (Tr. 230-232, 235, 260-261.) Except for the testimony of Mrs. Richardson, there was no direct evidence contradicting Appellant. It is true that "malice may be implied or inferred from the act committed," Fryer v. United States, 93 U.S. App. D.C. 34, 38, 207 F.2d 134, 138 (1953), cert. den., 346 U.S. 885; but Appellant testified that he did no act from which such an implication or inference could arise. He did not point the gun at Mr. Tarrant Sr. (Tr. 265), he did not think the gun was loaded (Tr. 263), he did not pull the trigger (Tr. 235, 266). Only Mrs. Richardson said the shooting was deliberate.

It is submitted that a reasonable juror could not accept Mrs. Richardson's testimony as establishing Appellant's guilt of murder beyond a reasonable doubt. Quite apart from what her demeanor on the stand may have been and from the impression the jury may have formed of her reliability, her account was inherently incredible. Her testimony contradicted two points of physical evidence.

(1) Mrs. Richardson denied that Mr. Tarrant Sr. had a stick and said she saw no stick. (Tr. 278.) But there was a stick. A police officer found it in the hallway. (Tr. 183.) In his closing argument, the prosecutor suggested that Mr. Tarrant Sr. must have had a stick. (A Tr. 94.)

(2) Mrs. Richardson testified that Appellant shot Mr. Tarrant Sr. from an arm's length away, in a hallway. (Tr. 278.) In fact, the bullet that killed Mr. Tarrant Sr. did not enter the front of his body, but the side. He was shot at the point of the left armpit, and the bullet travelled across his body into the right lung. (Tr. 149, 154.) The bullet hit no bone. (Tr. 180.) The Deputy Coroner testified that the gun was "to the front slightly. Slightly in front and to the left of the deceased." (Tr. 177.) The shot "undoubtedly came from somewhere off to the man's left." (Tr. 180.)

Mrs. Richardson's version of events also failed to account for the shot which wounded Appellant. To believe her testimony that the first of the two shots hit Mr. Tarrant Sr. (Tr. 27-28), one must accept one of two equally incredible theories: Either that Appellant shot himself for no reason at all; or that Mr. Tarrant Sr. after being fatally wounded, with a bullet in his lung, blood pouring from his mouth, wrested the gun away from Appellant and shot Appellant in the arm.

In sum, there was insufficient evidence to prove malice

aforethought beyond a reasonable doubt. Appellant's motion for judgment of acquittal of second degree murder should have been granted.

II. THE COURT'S FAILURE TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER WAS PLAIN ERROR

(With respect to Point II, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 228-232, 234-235, 246-247, 250-251, 257-266, 284-293, 310, 313.)

In the court below, Appellant took the stand and testified about the death of Mr. Tarrant Sr. in detail. He admitted that the fatal shot came from a pistol he held in his hand. He said that, although he was shocked and alarmed, his "thinking was quite clear." (Tr. 234.) He made no claim, by way of self defense, that he had thought himself in imminent danger of death or serious bodily harm.

Yet Appellant's testimony was by no means a confession of guilt. He stated that he did not know the pistol was loaded. (Tr. 263.) He did not take it into the apartment to shoot at anyone, but only to warn away a man who had just given him a severe beating. (Tr. 230-231, 260-261.) He pointed the pistol toward the ceiling, holding it high, trying to keep it out of reach. (Tr. 265.) He did not consciously pull the trigger.

(Tr. 263, 269.) Appellant told the jury, in short, that he was innocent of any intent to kill or injure anyone.

If the jury believed Appellant's testimony they should, under correct instructions, have acquitted him. The error in the court's charge regarding homicide which is not criminal is argued as Point III, below.

The evidence also raised the issue of involuntary manslaughter. The instructions to the jury on manslaughter, however, were deficient, to the serious prejudice of Appellant.

In United States v. Pardee, 368 F.2d 368, 373-375 (4th Cir. 1966), the court discussed the "universal concept of the crime" of involuntary manslaughter, quoting with approval "a thorough and authoritative exposition of the crime ... written by the late Judge Chesnut in State of Maryland v. Chapman, 101 F.Supp. 335, 340-341 (D. Md. 1951)." The Court of Appeals adopted Judge Chesnut's ruling that (368 F.2d at 374) --

> "... involuntary manslaughter is a felonious homicide in which one takes the life of another without legal excuse 'unintentionally while needlessly doing anything in its nature dangerous to life, or *** by neglecting a duty imposed either by law or by contract.'"

It is involuntary manslaughter where death results from an unlawful act. But the view that any unlawful act suffices is not correct. (368 F.2d at 371.) The unlawful act must be one which is either "in its nature dangerous to life" or "constitutes criminal negligence." (368 F.2d at 374.)

In the case at bar, there was evidence that Appellant's return to his apartment was not an unlawful act in the sense that it violated a statutory prohibition. The United States conceded as to the apartment that Appellant "lived there." (A.Tr. 125.) It was Appellant's "dwelling house"; so that he did not violate a statute by carrying a pistol there (see D.C. Code, § 22-3204) and his entry into the apartment was not housebreaking or trespass, see Cady v. United States, 54 App. D.C. 10, 13, 293 F. 829, 832 (1923). Finally, Appellant testified that his intent in possessing the pistol was not an intent to use it unlawfully against another, which would violate Section 22-3214(b) of the Code.

The remaining question was whether there was an unlawful act in the sense of "criminal carelessness." See Story v. United States, 57 App. D.C. 3, 16 F.2d 342 (1926), cert. den., 274 U.S. 739. As stated in 1 Wharton's Criminal Law 614-615 (Anderson ed. 1957):

> "With few exceptions [i.e., felony murders], an unintentional killing of a human being arising from a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is manslaughter. As the responsibility of the defendant is predicated upon negligence, the manslaughter should be classified as involuntary."

In Austin v. State, 110 Ga. 748, 36 S.E. 52 (1900), defendant testified that while he was involved in a "playful"

struggle with the deceased, she grasped the barrel of a gun which he held in his hand. The gun discharged, and the death resulted. The court reversed a conviction of murder, holding (36 S.E. at 52):

> "Where death results to one from the discharge of a gun in the hands of another, and there was no intention to kill, nor an intention to discharge the gun, the person in whose hands the gun was held would not be guilty of murder, although the gun may have been handled in a careless and negligent, even reckless, manner. In such a case the slayer would be guilty of involuntary manslaughter only ..."

See also Vigil v. People, 143 Colo. 328, 353 P. 2d 82 (1960).

The court's instructions should submit to the jury all issues arising from the evidence, including evidence which is contradicted. Stevenson v. United States, 162 U.S. 313, 314 (1896). The evidence in the case at bar called for an instruction on involuntary manslaughter. The court gave none.

After a brief general definition of manslaughter, the court spoke at length of that crime and defined it only in terms of adequate provocation and heat of passion (Tr. 292-293). The instructions on the key point of what reduces murder to manslaughter were as follows (Tr. 292-293):

> "In order to reduce murder to manslaughter the provocation must be of such a degree as will cause an ordinary man to act on impulse and without reflection. In addition to great provocation there must be passion and hot blood caused by that provocation. A trivial or slight provocation disproportionate to the violence of the retaliation is not adequate provocation

> to reduce the crime from second degree murder to manslaughter.
>
> "If you find that the defendant inflicted an injury to the deceased from which he died and that this injury was inflicted in a sudden heat of passion and hot blood caused by adequate provocation but without malice, bearing in mind the definition of malice that I have given you, you may find the defendant guilty of manslaughter."

The instructions told the jury that murder would be reduced to manslaughter only if the fatal injury to Mr. Tarrant Sr. was inflicted "in a sudden heat of passion and hot blood." These instructions may well have excluded a manslaughter verdict altogether; for Appellant's testimony lent minimum direct support to a finding of heat of passion. There was evidence of adequate provocation, for immediately prior to his death Mr. Tarrant Sr. (aided by his son) gave Appellant a severe beating. See 1 Wharton's Criminal Law 593 (Anderson ed. 1957). But Appellant did not directly maintain that he returned to his apartment with "reason dethroned" by a passion of anger, fear, or desire for revenge; his thinking, he testified, "was quite clear." (Tr. 234.) His intent in returning was not a passion-induced intent to close with Mr. Tarrant Sr., but an intent to keep Mr. Tarrant Sr. at his distance by displaying a pistol. (Tr. 230-231, 261.)

The court below did charge that (Tr. 291):

> "Manslaughter is the unlawful killing of a human being without malice. For example, it may be such

> killing as happens ... in the commission of an unlawful act without any deliberate intention of doing any mischief at all."

But where, as here, the evidence requires instructions as to involuntary manslaughter, it is not sufficient for the court merely to say that death resulting from an unlawful act may be manslaughter. There must be a charge explaining the nature of the element of unlawfulness. In the Pardee case, supra, the court stated: "Our disagreement with the District Court is that the full character of the unlawful act as an ingredient of involuntary manslaughter was not completely explained to the jury." (368 F.2d at 373.) See Barry v. United States, 109 U.S. App. D.C. 301, 302, 287 F.2d 340, 341 (1961), where the Court held that "the responsibility of instructing the jury upon the essential elements of a crime rests upon the court," even if overlooked by counsel. The point is particularly pertinent to the case at bar, because the court's brief reference to the overall definition of manslaughter was completely obscured by extensive instructions on adequate provocation and heat of passion which follow it.

The court's failure to instruct on involuntary manslaughter gravely prejudiced Appellant. Since the jury did not acquit him, it is apparent that under the instructions given they considered his conduct to be criminal. The question was, In what degree? The jury's concern with the degrees of

criminal homicide was manifested by a note they sent to the court, indicating their desire to weigh "the degree to which the case could be reduced." (Tr. 312.) In another note, the jury asked to be re-instructed as to what constitutes first degree murder, second degree murder, and manslaughter. (Tr. 313.) In response to this note, the court quoted its original charge, telling the jury again that in order to reduce murder to manslaughter there must be adequate provocation and heat of passion. (Tr. 321.)

"Failure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly 'affect substantial rights within the meaning of Rule 52(b) [Federal Rules of Criminal Procedure]." Tatum v. United States, 88 U.S. App. D.C. 386, 389, 190 F.2d 612, 615 (1951). Specifically, failure to instruct the jury on involuntary manslaughter where the evidence requires such instructions is plain error. See McDonald v. United States, 109 U.S. App. D.C. 98, 284 F.2d 232 (1960). The evidence in the case at bar plainly did call for instructions on involuntary manslaughter. Indeed, the prosecutor's final words to the jury put the case in a posture which would have called on the jury to consider involuntary manslaughter had the jury been correctly instructed (A Tr. 127-128):

> "As I understand the defense of accident ... you have to be doing something lawful when the accident happens. You have to have, as they say in some kinds of law suits, clean hands. You can't drive a car 125 miles an hour down the middle of F Street Park, whatever they call it, the middle, and then say it was an accident when I hit the pedestrian. You have to be doing something lawful, something again reasonable. Whatever you are doing it had to be reasonable.
>
> "Was the breaking in of this front door and demanding of the gun, the loading of the gun, going in with it, was reasonable? That is the question.
>
> "That is all I have."

The trial court's omission to give instructions on essential questions of law was plain error.

III. THE INSTRUCTION ON EXCUSABLE HOMICIDE WAS PLAINLY ERRONEOUS

> (With respect to Point III, Appellant desires the Court to read the following pages of the reporter's transcript: A Tr. 59, 81, 83; Tr. 294-295.)

In the court below, Appellant sought acquittal on the ground that the death of Mr. Tarrant Sr. was an accident. (A Tr. 59.) The court itself prepared an instruction on homicide to which no criminal responsibility attaches (A Tr. 59, 81, 83), and read it to the jury as follows (Tr. 294-295):

> "You are instructed that no criminal responsibility attaches to a slaying which is the result of accident or misadventure.

> A homicide which is unintentional and the result of accident or misadventure is an excusable homicide. Three elements enter into this defense of excusable homicide by misadventure:
>
> "First, the act resulting in death must have been a lawful one.
>
> "Second, it must have been done with reasonable care and due regard for the lives and persons of others.
>
> "And third, the killing must have been accidental and not intentional."

This instruction misstated the law, to Appellant's detriment.

The holding of the Supreme Court of North Carolina, in State v. Early, 232 N.C. 717, 62 S.E. 2d 84, 86 (1950), describes the error of the instruction given by the court below:

> "The vice in this charge...is that defendant's plea of an accidental killing is made unavailable to him if in the handling of the pistol he was merely negligent, rather than culpably negligent as the term is used in the law of crimes."

The defendant in the Early case had testified that, while pursuing the deceased after an argument and a fight, he stumbled and fell, causing an accidental discharge of his pistol. The North Carolina court reversed a conviction of involuntary manslaughter, for the reason quoted above, because the trial court had instructed the jury that "an accident which would relieve one charged with criminal offense" necessarily required that the killing "not be the result of negligence." (62 S.E. 2d at 86.)

The instruction of the court below, on "reasonable care and due regard for the lives and persons of others," did not describe criminal negligence. The degree of negligence necessary to establish the crime of manslaughter is "gross negligence," which "is to be defined as exacting proof of a wanton or reckless disregard for human life." United States v. Pardee, supra, 368 F.2d at 374. Furthermore, as the Court of Appeals stated in the Pardee case (ibid.):

> "... to convict, the slayer must be shown to have had actual knowledge that his conduct was a threat to the lives of others, or to have knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others. The reason of the latter comment is that awareness of the tendency to danger, or the foreseeability of injury, from the act or omission is an indispensable element of negligence... This requirement of proof gains stature when it is recalled that death as a result of an accident, that is an occurrence unpurposed and unattributable to negligence, does not give rise to civil or criminal liability... On a new trial, of course, the circumscriptions of the crime can be stressed to the jury."

The statutes of the District of Columbia demonstrate that in this jurisdiction negligence in a greater degree than ordinary negligence is required to make an unintentional homicide manslaughter. In Section 40-606 of the D.C. Code, Congress has created the crime of negligent homicide by motor vehicle. This crime consists of causing the death of another

by operating a motor vehicle "...in a careless, reckless, or negligent manner, but not wilfully or wantonly." If conviction of manslaughter did not require proof beyond a reasonable doubt of negligence of a greater degree than that defined in the statute, there would have been no reason to enact the statute. Negligent homicide is not an offense equal to manslaughter, but a lesser included offense. See D.C. Code §§ 40-607, 40-609a(a).

Thus the instruction of the court below was erroneous because it incorrectly defined the degree of negligence which is criminal. The court also erred in saying that "the act resulting in death must have been a lawful one." As held in the Pardee case, supra, not every unlawful act is sufficient to give rise to criminal responsibility for homicide, and the instructions should completely explain "the full character of the unlawful act as an ingredient of involuntary manslaughter." (368 F.2d at 373.)

A further error in the instruction appears in the court's description of excusable homicide as a "defense." Accident or misadventure is not an affirmative defense in a homicide case except where a statute so provides, and the defendant does not bear the burden of proving it. 40 C.J.S., pp. 1097-1098 (1944). The court should have instructed the jury to acquit Appellant unless convinced beyond a reasonable doubt that the death of

Mr. Tarrant Sr. was not the result of accident or misadventure. See Blocker v. United States, 110 U.S. App. D.C. 41, 288 F.2d 853 (1961); McAffee v. United States, 70 App. D.C. 142, 151, 105 F.2d 21 (1939).

The foregoing errors were plain errors under Rule 52(b), because they affected Appellant's substantial rights. See Tatum v. United States, 88 U.S. App. D.C. 386, 389, 190 F.2d 612, 615 (1951). Under the instructions given, the jury would convict Appellant even though they thought him guilty of no more then failure to use "reasonable care and due regard for the lives and persons of others." Furthermore, in his rebuttal argument, the prosecutor stated repeatedly that the question in the case was whether Appellant's conduct was that of a "reasonable man." (A Tr. 125, 128.) Thus the jury were told by court and prosecutor that Appellant could be convicted of criminal homicide on the basis of ordinary negligence.

The error in instructions was particularly prejudicial because combined with erroneous failure to charge on involuntary manslaughter. (Supra, pp. 16-23.) The jury were told in effect to convict Appellant of a crime if they thought him guilty of so much as negligence. In the absence of full instructions on involuntary manslaughter, it is no surprise that there was a conviction and that it was for murder.

IV. EXCLUSION FROM THE JURY OF PERSONS OPPOSED TO CAPITAL PUNISHMENT DENIED APPELLANT A CONSTITUTIONAL RIGHT

With respect to Point IV, Appellant desires the Court to read the following pages of the reporter's transcript: A Tr. 8-11.)

During voir dire examination, the prosecutor asked prospective jurors having "feelings of conscience" for or against capital punishment to identify themselves. (A Tr. 8.) Six prospective jurors stated that they opposed capital punishment, and all six were excused for cause. (A Tr. 8-11.)

The prosecutor inquired about opposition to capital punishment in terms of the prospective jurors' ability to be "fair and impartial." (A Tr. 8.) The question which led to the exclusion of all those opposed to capital punishment, however, was the following question by the court (A Tr. 9):

> "THE COURT. Do you have any conscientious scruples against the infliction of the death penalty...under any circumstance? ... In other words, I take it that even if you felt the evidence justified such a verdict you would not join in such a verdict if you knew the penalty would be death?"

This question - asking whether the prospective juror could join in a verdict of death - served no real purpose. Any prospective juror who identified himself as opposing capital punishment would answer in the affirmative. The court did not ask

whether the prospective jurors could make a fair determination with respect to guilt or innocence, as opposed to punishment.

The single question put by the trial court was error under the holdings of this Court. For under Turberville v. United States, 112 U.S. App. D.C. 400, 303 F.2d 411 (1962), cert. den., 370 U.S. 946, "the District Judge is to ask prospective jurors not merely whether they are opposed to the death penalty but also, if opposed, whether this private sentiment would prevent them from rendering a fair verdict on the basis of the evidence." Long v. United States, 124 U.S. App. D.C. 14, 19, 360 F.2d 829, 834 (1966).

The error was of Constitutional dimension. The Court of Appeals for the Fourth Circuit, sitting en banc, has recently held a "death qualified jury" to be unconstitutional. Crawford v. Bounds, _____ F.2d _____ (4th Cir., No. 10,981, April 11, 1968). The holding of the court, in which four of the seven judged concurred (for somewhat different reasons), was stated by Judge Winter as follows (Slip Opinion, p. 19):

> "... that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions - the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed - cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function

> of determining the issue of guilt from being fairly representative of the community..."

Judge Winter then stated that such disqualification "violates equal protection of the laws." Judge Sobeloff, concurring, concluded (Slip Opinion, pp. 34-35):

> "that there has been a violation of the Fourteenth Amendment in this case simply because the issue of guilt or innocence was submitted to a jury under the trial court's rulings which systematically excluded for cause every juror entertaining any scruples about capital punishment, and this without even inquiring whether these beliefs would preclude a fair consideration of the guilt issue."

Judge Sobeloff thought that "not only were both due process and equal protection...infringed, but no less emphatically the defendant's Sixth Amendment guarantee of trial by an impartial jury..." Judge Craven rested his concurrence on due process and right to trial by jury. Judge Butzner joined the opinion of Judge Winter.*/

When the jury were selected in the case at bar, Appellant was under indictment for first degree murder. The jury selected would determine Appellant's guilt or innocence and, if he were convicted of first degree murder, could fix the punishment at death or life imprisonment. D.C. Code, § 22-2404. Even though

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*/ The United States Supreme Court has heard argument, this Term, in cases presenting the question whether disqualification of jurors opposed to capital punishment violates the Sixth and Fourteenth Amendments. Witherspoon v. Illinois, No. 1015; Bumper v. North Carolina, No. 1016.

he was not sentenced to death, Appellant was denied determination of his guilt or innocence by a jury complying with "the established tradition ... that the jury be a body truly representative of the community." Cf. Smith v. Texas, 311 U.S. 128, 130 (1940). The Constitution requires that the group of persons from whom juries are selected reasonably reflect "a cross-section of the population suitable in character and intelligence for that duty." Brown v. Allen, 344 U.S. 443, 474 (1953).

It is stated in Turberville v. United States, 112 U.S. App. D.C. 400, 408, 303 F.2d 411, 419 (1962), cert. den., 370 U.S. 946, that an accused's right to a fair cross-section of the community ends when names are put in the box from which panels are drawn. That reasoning is not sound, because it would permit the exclusion, through voir dire examination, of any group or groups from jury service. Moreover, the Turberville opinion was written at a time when the death penalty was mandatory for first degree murder. D.C. Code, § 22-2404 (1961 ed.). The current statute, which separates the issue of guilt from the issue of punishment, raises different issues.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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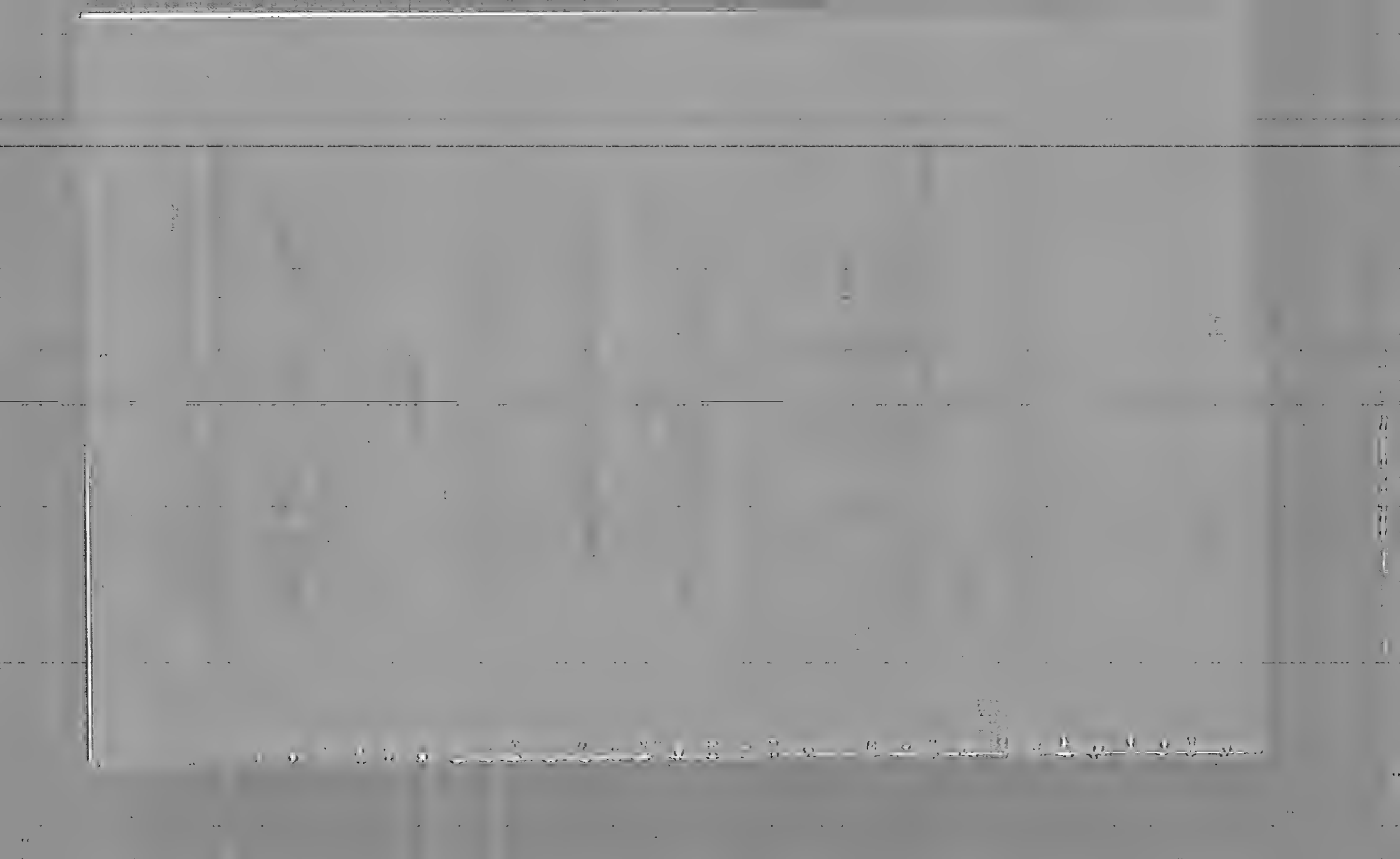

ISSUES PRESENTED

1. Was there sufficient evidence of malice aforethought to enable the jury to find appellant guilty of second degree murder?

2. Was there any evidence fairly tending to show that appellant unintentionally killed the deceased without malice aforethought?

3. Was the defense of accident available to appellant?

4. Was appellant denied a fair trial by the exclusion from the jury of those prospective jurors having scruples against capitol punishment?

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TABLE OF CASES

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OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,553

ROBERT WALTER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Summary of Proceedings

On April 20, 1965, an indictment was filed charging Robert Walter, Jr., with first degree murder (22 D.C. Code § 2401) for the gunshot slaying of George Robert Tarrant on January 30, 1965. Appellant was arrested, without a warrant on January 31, 1965. Brought before the United States Commissioner for a preliminary hearing on March 11, 1965, he was held for the action of the Grand Jury. The case was called for trial on September 3, 1967, and, following a voir dire during which prospec-

tive jurors with "feelings of conscience" against capitol punishment were excused, trial commenced (Tr. A. 3-35).

B. The Government's Case

The first witness for the Government was Mrs. Inez Richardson, sister of the deceased George Robert Tarrant, who on the Saturday evening of the homicide resided with the deceased at the location of the slaying, 1471 Lanier Place, N.W., apartment 44, along with the deceased's son, George Robert Tarrant, Jr., his fifteen year old daughter, Reva Tarrant, her boyfriend—the appellant, Reva's infant son and Mrs. Richardson's own infant grandson (Tr. 3-5). Her testimony was followed by that of George Robert Tarrant, Jr., age eleven (Tr. 83-84), and that of Joseph L. Hardison, companion of the appellant on the 30th of January, 1965. (Tr. 122, 124). It was their descriptive testimony which recreated the circumstances attending the death of Mr. Tarrant. The remaining Government witnesses, Deputy Coroner Dr. Lenwood L. Rayford (Tr. 147) and Detective Antonio F. Ruiz of the Homicide Squad, provided the scenario to the earlier recital of events.

The pistol appeared early on that Saturday evening when appellant, who had come into the apartment on Lanier Place looking for Reva Tarrant (Tr. 6), displayed it to young Tarrant, Jr. (Tr. 84). Walter subsequently removed the clip from the pistol, put the clip in his pocket and gave the gun to Mrs. Richardson's three year old grandson to play with (Tr. 85). Mrs. Richardson who was in the kitchen learned of this and told Walter to take the pistol from the child (Tr. 8). Appellant, who had come into the kitchen, appeared to Mrs. Richardson to have been drinking (Tr. 35-36). After he recovered the weapon he left (Tr. 86).

Reva came home to the apartment about an hour and a half after appellant departed; Mrs. Richardson told her that Walter was looking for her (Tr. 11). Subsequently, Mrs. Richardson went to the market and when she returned she found that her brother had come home

(Tr. 11). He had come in about 9:00 or 9:30 p.m. (Tr. 87). In the meantime Reva had gone out and come back (Tr. 86). At the time Mrs. Richardson returned from shopping Reva, the senior and junior Tarrants, and the infants were in the apartment (Tr. 13). A little later Reva left and returned, going directly to her back bedroom (Tr. 14). Almost immediately there was a knock at the door and the deceased's son opened it to admit appellant who, after asking for Reva, referring to her as his wife (Tr. 87), went to the bedroom and followed Reva from there to the bathroom (Tr. 17). He knocked at that door; when she came out they began arguing in the hall, Reva was crying (Tr. 18).

Tarrant, Sr. then got up from his seat in the living room, went into the doorway of the hall and said, "I don't want this going on in my house; you leave Reva alone and I guarantee you she will leave you alone." (Tr. 19, 61). The pair continued to bicker and Tarrant then went down the hallway to where they were (Tr. 63). Soon the two men, wrestling with each other, hurtled through the hall door into the living room and fell onto a table, demolishing it (Tr. 19). They were grappling on the floor with the deceased on top, when Tarrant, Jr. broke a Coke bottle over appellant's head (Tr. 20, 88). At the order of his father, Tarrant, Jr. then left the apartment to get the police (Tr. 20, 88).

Appellant, who was dressed in a tan raincoat, was then dragged by the collar through the hall of the apartment into the outside hallway by the senior Tarrant, who closed the door behind them (Tr. 21, 66-67). Mrs. Richardson reopened the door and told her brother to come back in (Tr. 21). At that time she saw another man, a third man, in the hall (Tr. 22), and heard her brother say "Don't come back in this house." (Tr. 21, 68). She did not notice any signs of bleeding nor did she see a gun (Tr. 22).

This other man was Joseph L. Hardison (Tr. 130). He had met up with Walter on the afternoon of January 30, in the vicinity of 17th and U Streets, N.W., and the two

had gone to the nearby home of Hardison's sister-in-law (Tr. 123-125), where they shared a pint of wine (Tr. 127). While there Walter took out this pistol and displayed it (Tr. 125). Hardison, seeking to avoid trouble, took the pistol from appellant who retained the clip (Tr. 126). With the components of the pistol divided among them, they left and took a bus to 18th and Columbia Road, N.W. (Tr. 128). Once off the bus and while walking towards Walter's Lanier Place apartment they met Reva on the street (Tr. 129, 136). Reva and Walter argued briefly and Hardison, fearing that a fight was about to start, told Walter not to do that (Tr. 129).

The three then went to the apartment building, Hardison waited in the lobby while Reva and appellant went upstairs (Tr. 130). While he was waiting he saw the junior Tarrant come running down the stairs, shouting, and out the door; Hardison then went upstairs (Tr. 130). He found Tarrant and Walter fighting on the floor at the head of the stairway (Tr. 130-31). He broke up the fight by pulling Tarrant off of Walter (Tr. 138-139); neither man seemed bloodied (Tr. 131). Tarrant was punching Walter when Hardison happened on the scene (Tr. 131) and apparently had the better of him (Tr. 137. Hardison overheard Tarrant say, "I am tired of you running over me." (Tr. 137).

Once the two were separated, Tarrant left the scene (Tr. 139), and Walter, in an agitated state (Tr. 140), got up and demanded of Hardison, "Give me my gun, give me my gun." (Tr. 131). Hardison tried to keep from giving it up to him and started down the stairs (Tr. 131). Walter pursued and at the stairway landing, one flight from where he and Tarrant had fought, caught up with Hardison who, after being punched a few times, took the gun from his rear pocket and gave it to Walter (Tr. 131). The clip was out of the gun (Tr. 129, 132) and Walter had it (Tr. 128). Hardison then left the scene (Tr. 132-133).

When Mrs. Richardson brought her brother back inside, she locked the door behind her (Tr. 22); she had in her

possession the only key to the apartment (Tr. 58). Through the door she heard Walter ask for his gun, and told her brother not to stand in front of the door (Tr. 23). He then went into the living room and sat down (Tr. 23), while Mrs. Richardson swept up the pieces of the broken Coca-Cola bottle from that room's floor (Tr. 24). She was standing in the living room when she heard the front door break open (Tr. 24, 72). Her brother got up from his seat and went to the doorway to the hall; she followed just behind him (Tr. 24, 70). Walter had a pistol in his hand and, as Tarrant turned and stepped from the living room into the hall and faced Walter. Walter shot him (Tr. 24, 25, 70, 79).

Mrs. Richardson actually saw appellant shoot her brother (Tr. 71), as she was right behind him when the shot was fired (Tr. 78). The two men were separated only by an arm's length when the first shot was fired (Tr. 77). Tarrant, after the shot was fired, grabbed Walter in a bear hug around his chest (Tr. 26) and, pushing him to the wall (Tr. 278), cried out, with blood gushing from his mouth, "Inez, Inez." (Tr. 27). At the time Walter's arms were raised above his head and in his right hand he held a pistol (Tr. 27). Mrs. Richardson did not see any kind of a weapon in her brother's hands, nor did she see him grab hold of the gun (Tr. 278). At this point Mrs. Richardson ran from the apartment but, remembering her infant grandson, returned for him and reexited carrying the child and calling for the police (Tr. 27, 28). When she eventually returned, she noticed the lock on the front door had been broken; it hadn't been before the incident (Tr. 32).

Tarrant, Jr. also saw Hardison in the hall, for having failed to find a policeman outside where he did see Reva hiding behind a car, he had gone back up to the apartment (Tr. 89). He heard Walter tell the other man to give him his gun and get it from him (Tr. 89). When this happened the young Tarrant cursed at Walter and ran back down stairs; he had gotten half way down when

he heard the first shot and was going out the front door when he heard the second (Tr. 90).

Subsequent testimony from Detective Ruiz and Dr. Rayford, along with some stipulations, completed the Government's case. Detective Ruiz found the deceased lying dead in a pool of blood on the floor of a bedroom in the apartment (Tr. 182). From the apartment he followed a trail of blood downstairs and out a third floor rear window onto a fire escape (Tr. 183-184). In the alley below a pistol, clip in and loaded with four rounds, was recovered (Tr. 189). By stipulation the jury learned that the slug recovered from Tarant's body was fired from that pistol (Tr. 93-94). When appellant came into Detective Ruiz's custody it was about 3:00 a.m. on January 31; Walter had been arrested at a hospital where he had gone for treatment for a gunshot wound in the left arm and a laceration to his head (Tr. 188).

Dr. Rayford testified that the deceased had died from a gunshot wound, the bullet having entered the body slightly below and anterior to the left arm pit (Tr. 154), and traversed through the chest cavity, from left to right, coming to rest in the upper right lobe of the lung (Tr. 149). The bullet had followed a horizontal trajectory, slightly front to back (Tr. 176, 177). Dr. Rayford's opinion was that the gun was fired "Slightly in front and to the left of the deceased." (Tr. 177).

At the conclusion of the Government's case, defendant moved for a directed verdict of acquittal on the first degree murder count (Tr. 189). This was denied (Tr. 189), whereupon the defense put on its case, the theory of the defense being accident (Tr. A 59), by calling Walter as a witness in his own behalf.

C. The Case for the Defense

After a preamble relating the circumstances which brought all the principals to reside together in the apartment at 1741 Lanier Place, N.W. (Tr. 199-209), appellant began his chronicle of the events of January 30, 1965.

He left the apartment between eleven and twelve, a.m. (Tr. 206, 209) and went to the home of Tarrant Sr.'s niece Joyce, who lived with Louis Hairston (Tr. 210). Louis and he had a few drinks when Hairston said he wanted to borrow some money; after a short discussion appellant advanced a loan of five dollars (Tr. 236), and took back as security a pistol and its loaded clip (Tr. 210, 237). This was the weapon which became the instrument of Tarrant's death (Tr. 210-220). He knew it was an operable weapon because he had seen Hairston fire it (Tr. 238).

From there Walter returned to Lanier Place. Upon his return, after asking about the whereabouts of Reva, he took off his coat and went to the bathroom leaving the pistol, empty of clip, on a small dresser in the hall under his coat. (Tr. 221, 243). When he learned that a child had the pistol he took it from him; he then departed having stayed only about five minutes. He denied giving the child the weapon. (Tr. 222-223). He took the pistol along because Hairston was expected to return the five dollars around five that afternoon (Tr. 239, 246). He put the pistol in one pocket, the clip in another (Tr. 241).

Walter went directly to the vicinity of 17th and U Streets, N.W., arriving there about quarter to three, and from there to an address on 17th Street, where he had a couple of beers with friends (Tr. 223). Soon after he left there to go to Hairston's, he met up with Joe Hardison (Tr. 223). They went to Hardison's sister-in-law Alvena's place (Tr. 224). Walter's drinking having caused his attention to wander from Hairston and his five dollars, he forgot all about the repayment appointment (Tr. 247). While at Alvena's the subject of lending came up again, Hardison stating the need for twenty dollars (Tr. 224). While there Walter took out the pistol for public display (Tr. 225).

Appellant agreed to loan the twenty dollars, but since his money was at Lanier Place they would go there for it (Tr. 225, 227). Before they left, Hardison insisted on taking the pistol and, according to Walter, the clip with

it, so that his money source would not be dried up by an untimely arrest on a weapon's charge (Tr. 225, 249-250). It was about nine p.m. when they left (Tr. 225); appellant did not know whether Hardison had put the clip into the pistol (Tr. 251). They took the bus to Lanier Place, getting off at 18th and Columbia Road (Tr. 227). They met Reva near the entrance to the apartment building (Tr. 227, 251). Walter and she had a little friendly conversation, he was amused in catching her in the lie that she had been at Alvena's all afternoon (Tr. 251, 252). After their discussion she "spun around" and ran up the steps to apartment 44 (Tr. 228, 252).

He went up the stairs after Reva and knocked on the apartment door. When Tarrant, Jr. opened the door he walked into the living room, asked for Reva, and was told she was in the bathroom and that she was crying (Tr. 228, 253). As he went towards the bathroom, Tarrant, Sr. sprang up and barred his way saying that he was tired of Walter ". . . running over my daughter," and added that "my daughter is only sixteen years old." (Tr. 228). After a short dispute over Reva's age, appellant testified that Tarrant swung and hit him (Tr. 229, 257). Walter's explanation for this unexpected display of ill will from a man with whom he had previously gotten on with, was that Inez Richardson had turned Tarrant against him by suggesting that he was too old for Reva (Tr. 254-255).

A struggle ensued and the two men toppled onto a box spring and mattress lying on the living room floor (Tr. 229, 258); Walter didn't recall falling on a table (Tr. 229). As he lay, half on and half off the mattress, pinned down by Tarrant, Tarrant, Jr. struck him with the Coke bottle (Tr. 229, 258). He was knocked unconscious and the next thing he remembered was he was outside in the hall where Tarrant was kicking and punching him (Tr. 230, 259). When the beating stopped, Walter noticed blood running down the left side of his face; he also noticed that Hardison was present and Tarrant had gone (Tr. 230, 260). He immediately decided to go back

into the apartment, his money was there and he didn't want to go out on the street looking a bloody mess (Tr. 230-231, 260-261). He demanded that Hardison give him the gun (Tr. 231).

Hardison, in a teasing fashion, handed him the gun, handle first (Tr. 262), and left (Tr. 231, 263). Walter did not know whether the clip was in the gun or not (Tr. 263). After knocking on the apartment door and waiting for a few seconds without getting a response, he kicked on the door which, to his great surprise, flew open (Tr. 231, 263-264). Ten or fifteen seconds had elapsed from the time Tarrant had gone back in and Walter got the gun; during this period his thinking was "quite clear" (Tr. 234). He went back in armed because, "The gun was my passport. I figured if he saw it he wouldn't bother me." (Tr. 261). He had given no thought to calling the police (Tr. 261).

As he lunged into the apartment, Tarrant was turning the corner out of the living room into the hall with a stick, probably a leg from a table (Tr. 265), in his right hand (Tr. 231). Walter was off balance as he went through the door, but the gun was pointing at the ceiling (Tr. 264-265). Walter grabbed for the stick with his left arm (Tr. 231). Tarrant, seeing the gun, reached for it with his left hand, and, taking it by the barrel, began twisting it with his hand (Tr. 231, 265-266). The stick in Tarrant's hand struck Walter a slight blow (Tr. 231). As he twisted the gun it went off, Walter was shot in the arm; the pistol discharged a second time and Tarrant was hit (Tr. 231, 266).

Walter said that the gun went off because Tarrant twisted it, although his own finger was on the trigger (Tr. 267); he had no idea that there was a bullet in the chamber of the gun (Tr. 269). When Tarrant was hit he yelled, "Inez, Inez" with blood gushing out of his mouth (Tr. 231, 267). Although, as Walter testified, Tarrant did not grab him after the man was shot (Tr. 267), both men fell to the floor after Tarrant was shot

(Tr. 232). Walter then got up and fled from the apartment (Tr. 232, 268).

D. Post Testimony Proceedings

Following Inez Richardson's rebuttal testimony for the Government (Tr. 277-279), the question of instructions was taken up (Tr. A59). It was at the outset of these discussions that defense counsel reiterated his earlier statement (Tr. 270) that Walter's defense was accident and not self defense (Tr. A59). Before consideration of the instructions on first degree murder, second degree murder, manslaughter, flight and accidental death (Tr. A59), the court entertained defendant's renewed motion for judgment of acquittal as to first degree murder, enlarged to include a similar motion as to second degree murder (Tr. A61). After denial of these motions consideration of instructions began (Tr. A70).

When the discussions concluded the only unrequited objection of defendant was to what he characterized as an unduly conjunctive use of the phrase "premeditation and deliberation" in the first degree murder instruction (Tr. A70-73) during consideration of the court's proposed instructions on manslaughter defendant voiced reservations about lack of a guiding definition for the jury of the phrase "sudden heat of passion" (Tr. A75). This misgiving was resolved to his satisfaction when the court incorporated into its own instruction many elements of the manslaughter instruction prepared and proffered by the defense (Tr. A79-80). After this colloguy the court asked if there were any other objections in connection with the manslaughter (Tr. A80). Defense counsel responded, "none sir" (Tr. A81).

After closing argument, just before the jury was brought in to be instructed, the court notified defense counsel that he would give defendant's instruction on accidental death, rather than the one it had prepared (Tr. 283). Following instruction, and later reinstruction on first degree murder, second degree murder, and man-

slaughter (Tr. 313-322), the jury returned a verdict of guilty of second degree murder (Tr. 323).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perperating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perperate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code, Section 2405, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

SUMMARY OF ARGUMENT

I

Appellant's motion for judgment of acquittal of second degree murder was properly denied. The evidence viewed in light of the standards applied in this jurisdiction showed facts and circumstances from which malice aforethought could properly be found by the jury.

II

The jury was instructed on the offense of involuntary manslaughter. This instruction was, however, unnecessary because if the killing was unintentional, it was one resulting from the commission of a willful and malicious act, and hence could be no less than murder in the second degree.

III

Appellant is now estopped from attacking the accident instruction he prepared. Furthermore, since the killing resulted from the commission of a willful and malicious act, accident can be no defense.

IV

Since appellant did not receive the death sentence exclusion from the jury of those who had scruples against capital punishment was not reversible error.

ARGUMENT

I. The trial judge properly denied appellant's motion for judgment of acquittal of second degree murder.

(Tr. 24-25, 70, 77, 79, 126, 128, 129, 132, 231, 234, 262, 263-264, 278)

Appellant urges that the evidence was insufficient to support a finding of malice aforethought and hence the jury should not have been allowed to consider second degree murder. The standard to be applied in con-

sideration of this assertion is clear: ". . . in deciding whether to submit a case to the jury the trial judge must consider whether reasonable jurymen must necessarily have a reasonable doubt or whether, on the other hand, the evidence was such that a reasonable mind might fairly have a reasonable doubt or might not have such doubt." *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967). Since the motion for judgment of acquittal as to second degree was first made at the conclusion of the defense case and after Government rebuttal (Tr. A61), the trial judge may properly consider all the evidence introduced at trial,[1] in the light most favorable to the prosecution,[2] and on that basis decide whether ". . . a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime." *Austin* v. *United States*, 127 U.S. App. D.C. 180, 189, 382 F.2d 129, 138 (1967).

Essentially, murder in the second degree is homicide with malice but without deliberation or premeditation,[3] an intentional killing committed on impulse or in sudden passion,[4] or an unintentional killing resulting from a willful and malicious act.[5] Malice is a condition of mind which prompts a person willfully to injure another.[6] "Malice may be established by reference to either of two standards: One, a subjective standard—whether the defendant actually intended or foresaw that death or serious bodily harm would result from his act; and the other, an

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[1] *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963).

[2] *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947).

[3] *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962).

[4] *Austin* v. *United States*, *supra*.

[5] *Hansborough* v. *United States*, *supra*, note 3.

[6] *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 207 F.2d 134 (1953).

objective, 'reasonable man' standard—whether the defendant should have foreseen that such result was likely." *Belton* v. *United States*, 127 U.S. App. D.C. 201, 205, 382 F.2d 150, 154 (1967).[7]

Turning to the evidence presented, there was abundant basis for a reasonable juror to conclude that malice, as a state of mind or negligent pattern of behavior, existed. Walter admitted taking the gun from Hardison (Tr. 231, 262). Hardison said it was unloaded when he gave it to Walter (Tr. 128, 129, 132). Since the gun was obviously loaded when Tarrant was shot, it could fairly be concluded that appellant loaded it; Hardison said he had the clip (Tr. 126). During the ten to fifteen seconds it took for Walter to get the pistol his thinking was "quite clear" (Tr. 234). He waited at the door for a few seconds after knocking and before kicking it in (Tr. 231, 263-264). He went in with the gun drawn, at least, by his own admission, to intimidate Tarrant with it (Tr. 261). When Walter came through the door, Tarrant got up from his seat in the living room and went into the hallway; as he stepped from that room and turned into the hall to face Walter, Robert Walton shot him (Tr. 24-25, 70, 79). The two men were separated by only on arms length when the shot was fired (Tr. 77). The deceased had no weapon in his hands nor did he touch the pistol (Tr. 278).

From these facts a reasonable juryman could fairly have concluded that appellant intentionally, but impulsively and not in the heat of passion, killed Tarrant; or that Robert Walter actually foresaw or should have foreseen that such a result was likely if he went in using that pistol to intimidate Tarrant and unintentionally killed him while attempting to do so.

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[7] *Marcus* v. *United States*, 66 App. D.C. 298, 86 F.2d 854 (1936); *Bishop* v. *United States*, 71 App. D.C. 132, 107 F.2d 297 (1939); *Lee* v. *United States*, 72 App. D.C. 147, 112 F.2d 46 (1940).

II. Consideration of the entire charge to the jury on culpable homicide shows that the jury was adequately instructed, although unnecessarily, on involuntary manslaughter.

(Tr. 210, 221-222, 225, 234, 237, 238, 239, 261, 263, 267, 283-294)

A reading of the trial court's instruction [8] on the gradations of culpable homicide shows that there was an adequate instruction on the offense of involuntary manslaughter, although this offense was not described by name. It is also clear, however, that appellant was not entitled to such an instruction. Involuntary manslaughter is, as defined in *United States* v. *Pardee*, 368 F.2d 368, 374 (4th Cir. 1966) ". . . a felonious homicide in which one takes the life of another without legal excuse 'unintentionally while needlessly doing anything in its nature dangerous to life or, . . . by neglecting a duty imposed either by law or by contract.' " See also *Sinclair* v. *United States*, 49 App. D.C. 351, 265 Fed. 991 (1920); *Nestlerode* v. *United States*, 74 App. D.C. 276, 122 F.2d 56 (1941); and *Jones* v. *United States*, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962). The crucial distinction between unintentional second degree murder and unintentional manslaughter is malice. *Hansborough* v. *United States*, *supra*, footnote 3.

In the instruction the jury was told that manslaughter was killing without malice (Tr. 291). They were told that manslaughter ". . . may be such killing as happens . . . , in the commission of an unlawful act without any deliberate intention of doing any mischief at all." (Tr. 291). This clearly is the same offense described in *United States* v. *Pardie*, *supra*, as involuntary manslaughter. An analysis of the entire instruction relating to the distinctions between and characteristics of culpable homicides shows that the jury was fully advised as to the significance of "malice" and "intention".

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[8] See Appendix A.

'Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion.' *Howard* v. *United States*, —— U.S. App. D.C. ——, 389 F.2d 287 (1967). Here the trial court provided amplification for its charge that manslaughter ". . . may be such killing as happens . . . , in the commission of an unlawful act without any deliberate intention of doing any mischief at all." (Tr. 291), by the instructions which preceded on malice and intent. Reading the "involuntary manslaughter" charge in context with these instructions, i.e. considering the entire instruction on culpable homicides, shows that the jury was informed and instructed that it might find the appellant guilty of what is sometimes characterized as involuntary manslaughter.[9] *Howard* v. *United States*, *supra*.

However, simply because murder in the second degree and manslaughter share the attribute of unintentional killing,[10] does not mean the jury must be instructed as to both crimes.[11] Manslaughter, as stated earlier, is killing without malice; therefore an instruction on the offense of involuntary manslaughter would be proper only where there was evidence fairly tending to bear on the issue of an unintentional killing without malice; and where the evidence pointed only to an unintentional killing with malice such an instruction would be unnecessary and improper.[12]

The appropriateness of an instruction on involuntary manslaughter depends upon the nature of the unlawful enterprise engaged in when the killing results, which act was reasonably calculated to cause death or inflect serious bodily injury.[13] If the unlawful enterprise did not amount

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[9] The District of Columbia Code contains no "voluntary", "involuntary" distinction 22 D.C. Code § 2405.

[10] *Hansborough* v. *United States*, *supra*, footnote 3.

[11] Where the unintentional killing is not "felony murder" 22 D.C. Code § 2401.

[12] *Hansborough* v. *United States*, *supra*, footnote 3.

[13] Perkins Crim. Law F.P. (1957), pages 31-36; compare *Lee* v. *United States*, *supra*, note 7 and *Nistlerode* v. *United States*, *supra*.

to a willful and malicious act,[14] then an instruction on involuntary manslaughter would be appropriate.[15] Where, however, the unlawful enterprise was itself a willful and malicious act, other then felonious homicide itself, from which death resulted,[16] an instruction on involuntary manslaughter would not be necessary, because such a homicide could be no less than a killing with malice.[17]

The malicious and willful activity in which appellant was engaged from which Tarrant's killing resulted was assault with a dangerous weapon.[18] Walter's own story to the jury is an admission that he was engaged in the commission of this crime. He stated that when he went back into the apartment he went in armed because "the gun was my passport. I figured that if he saw it he wouldn't bother me" (Tr. 261). From this it is clear that he went in planning to intimidate Tarrant with the weapon; from the ultimate result of this entrance it is also clear that the pistol was loaded. The coincidence of these two elements constitutes an assault[19] with a weapon

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[14] *Hansborough* v. *United States, supra,* note 3: the full sentence from which this phrase comes states, "An unintentional killing which results from a willful and malicious act other than those specified in the first degree murder statute, D.C. Code § 22-2401, is likewise murder in the second degree." 308 F.2d at 647, 113 U.S. App. D.C. at 394. Those acts are punishable by imprisonment in the penitentiary. *Lee* v. *United States, supra,* note 7. Compare 22 D.C. Code § 2401 (murder in the first degree) and 22 D.C. Code § 2403 (murder in second degree).

[15] *United States* v. *Pardee, supra; Sinclair* v. *United States, supra,* and *Nestlerode* v. *United States, supra.* See also 18 U.S. Code § 1112 (a): "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary— . . .

Involuntary—In the commission of an unlawful act not amounting to a felony . . ."

[16] Perkins Crim. Law F.P. (1957) *ibid.*

[17] *Belton* v. *United States, supra, Marcus* v. *United States, supra,* note 7, *Lee* v. *United States, supra,* note 7, and *Richardson* v. *United States,* —— U.S. App. D.C. ——, (decided June 19, 1968).

[18] 22 D.C. Code § 502. See also 24 D.C. Code § 402.

[19] *Patterson* v. *Pillans,* 43 App. D.C. 505 (1915).

likely to produce death or great bodily harm,[20] and hence constitutes the felony.[21]

Appellant's statements, that he didn't know whether the clip was in the gun (Tr. 263) and that he had no idea there was a bullet in the chamber (Tr. 267), cannot save him.[22] It is well settled that "If no specific intent is required for guilt of the offense charged, a mistake of fact will not be recognized as an excuse unless it was based upon reasonable grounds".[23] Assault with a dangerous weapon is not a specific intent crime.[24] It follows that unless appellant's mistake[25] as to the armed state of the pistol was based on reasonable grounds, he was in the process of the commission of a felony when Tarrant was killed by a shot from the pistol.

Appellant's own testimony showed that he was familiar with the .32 automatic pistol which killed Tarrant. He had seen it fired and knew it worked (Tr. 238). When he received the pistol from Hairston he was given a loaded clip with it (Tr. 210, 237). He carried them around for some time (Tr. 221, 222, 239), before he gave both to Hardison (Tr. 225). When he took the gun back from Hardison it was loaded.[26] He took it handle first (Tr.

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[20] *Hopkins* v. *United States*, 4 App. D.C. 430 (1894), and *Tatum* v. *United States*, 71 App. D.C. 393, 110 F.2d 555 (1940).

[21] *Parker* v. *United States*, 123 U.S. App. D.C. 343, 359 F.2d 1009 (1966).

[22] Self defense cannot save him as this defense may not be successfully claimed by one who deliberately places himself in a position where he has reason to believe his presence will provoke trouble. *Rowe* v. *United States*, 125 U.S. App. D.C. 218, 370 F.2d 240 (1966) and *Lancy* v. *United States*, 54 App. D.C. 56, 294 Fed. 412 (1923).

[23] Perkins Crim. Law F.P. (1957) page 827.

[24] *Parker* v. *United States*, *supra*, note 14.

[25] It should be noted that at no time did appellant claim he thought the pistol was unloaded.

[26] This conclusion is unescapable if appellant's version of the facts is believed. Even if appellant's story were not believed the only alternate conclusion would be that he loaded the pistol himself.

263), which is to say by that part of the pistol into which the clip must be inserted to load the weapon. He said the process of getting the pistol from Hardison took ten or fifteen seconds during which time his thinking was "quite clear" (Tr. 234). It is submitted that on their face these facts or any inference that could be drawn from them belie any assertion that he had reasonable grounds to base a belief that the pistol was not likely to produce death or great bodily harm.

It follows that since appellant's own testimony is an admission that the killing resulted from the commission of a pre-planned willful and malicious act, assault with a dangerous weapon, that he was not entitled to an instruction on involuntary manslaughter, even though it was given.[27]

III. Appellant is estopped from now attacking his own instructions. In any event, the giving of the instruction was an unnecessary but harmless gratuity.

(Tr. 283)

The jury was instructed in the very words of appellant's own proposed instruction on accident (Tr. 283) and it is well settled that an appellant having requested an instruction cannot complain on appeal that the instruction was granted. *Weldon* v. *United States*, 87 U.S. App. D.C. 113, 183 F.2d 832 (1950). Also, as discussed previously, since appellant was, by his own testimony, committing a malicious and willful act from which Tarrant's death resulted, accident can be no defense. *Marcus* v. *United States*, *supra*, and *Lee* v. *United States*, *supra*.

IV. Appellant's right to an impartial trial was not compromised by the exclusion from the jury of those respective jurors opposed to capital punishment.

(Tr. A3-A35)

While a death sentence cannot be executed if imposed by a jury from whose ranks those opposed to capital pun-

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[27] *Richardson* v. *United States*, *supra*, footnote 17.

ishment have been culled, *Witherspoon* v. *Illinois*, —— U.S. ——, 88 S.Ct. 1770 (June 3, 1968); in a case such as this where a sentence of imprisonment has been imposed, such an exclusion does not amount to a denial of an accused's right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Bumper* v. *North Carolina*, —— U.S. ——, 88 S.Ct. 1788 (June 3, 1968).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

APPENDIX

The Court's instructions in pertinent part:

Ladies and geneltmen [sic] of the jury, the introduction of evidence in this case and the arguments of counsel now being concluded, it becomes the duty of the Court to instruct you as to the law that should guide you in your consideration of the evidence and the determination of your verdict.

When you retire to the jury room you will take with you a copy of the Indictment returned by the Grand Jury in this case.

Now the purpose of an Indictment is to inform the defendant of the charge, or charges, that he must meet when his case comes on for trial. An indictment is not evidence against the defendant and it should not be regarded by you as testimony against the defendant, nor as being of probative value, nor as being entitled to any weight whatsoever as evidence.

The defendant is charged in the indictment with the crime of murder in the first degree, that is, the killing of a human being purposely and with deliberate and premeditated malice. The indictment reads as follows:

> "On or about January 30, 1965, within the District of Columbia, Robert Walter, Jr., purposely and with deliberate and premeditated malice, did shoot George Robert Tarrant with a pistol, causing injuries from which the said George Robert Tarrant did die on or about January 31, 1965."

In order to sustain the charge of murder in the first degree the Government must establish from the evidence and beyond a reasonable doubt each of the following five elements:

(1) That the defendant, by means of shooting George Robert Tarrant caused him to die.

(2) That the defendant had the purpose and intent to kill him.

(3) That the killing was consummated and accomplished with malice.

(4) That the killing was consummated and accomplished with deliberation and premeditation.

(5) That the offense occurred in the District of Columbia on or about January 30, 1965.

The first element which must be established, that is, that the defendant by means of shooting George Robert Tarrant caused him to die needs no explanation.

Similarly, the fifth element, namely, that the act charged in the indictment occurred in the District of Columbia on or about January 30, 1965 speaks for itself.

I don't think there is any contention this didn't occur in the District of Columbia on or about that date.

The third element requires that the Government prove beyond a reasonable doubt that the killing was consummated and accomplished with malice.

Now what is meant by the word "malice"? Malice is a legal term. The law does not use malice, or the word malice, in its popular sense. Malice as the law uses the term does necessarily mean a malicious or evil or malevolent purpose, nor does it necessarily indicate a feeling of personal hatred or ill will, or hostility toward the decedant.

Malice in the eyes of the law has a broader significance, that is, it is a state of mind. Malice means a heart fatally bent on mischief and unmindful of social duty. It may also be defined as a condition of the mind that prompts a person to do an injurious act willfully, that is, intentionall [sic], to the injury of another, or intentionally to do a wrongful act toward another without justification or excuse.

Now an act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids, that is, with a bad purpose either to disobey or disregard the law.

Malice may be either expressed or implied. Expressed malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse.

On the other hand, implied malice is that which may be inferred from the circumstances of the killing.

The second element which the Government must establish beyond a reasonable doubt is that the defendant had the purpose and intent to kill George Robert Tarrant.

Now intent ordinarily cannot be proved directly because there is no way of fathoming the operation of the human mind, but intent may be deduced from the circumstances and from a defendant's act.

Now a person is presumed to intend the natural and probably consequences of his voluntary act. If a man uses upon another an object of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you may infer that he intended to kill. You are not compelled to presume that he intended to kill from such acts, but you have a right to consider them in reaching your determination of his intent.

Now the fourth element which the Government must establish beyond a reasonable doubt is premeditation and deliberation.

Premeditation is the formation of the specific intent or plan to kill.

Deliberation means further thought upon this plan or design to kill.

In other words, after the design or purpose to kill was formed, if such design or purpose to kill was formed, there must have been some reflection and consideration amounting to deliberation. Some appreciable interval of time must elapse during which there must have occurred some reflection and a consideration amounting to deliberation. This interval may be brief because the human mind at times works rapidly. The law prescribes no particular period of time. It necessarily varies according to the circumstances of each case. Consideration of the matter may continue over a prolonged period, that is, hours, days, or even longer. Then again it may cover a span of minutes.

If one forming an intent to kill does not act instantly but pauses and actually gives second thought

and consideration to the intended act, he has in effect deliberated. It is the fact of deliberation that is essential rather than the length of time it may have continued.

Consequently, if you find that the defendant purposely and with intent to kill George Robert Tarrant did so with deliberate and premeditated malice, that is to say with malice and deliberation and premeditation, you may find him guilty of murder in the first degree under the indictment.

Now there is a lesser offense included in the indictment known as murder in the second degree.

Murder in the second degree differs from murder in the first degree in that it may be committed without purpose or intent to kill, or it may be committed with purpose or intent to kill but without premeditation and deliberation.

Now the essential characteristics of first degree murder are premeditation and deliberation. Calculated and planned acts categorize first degree murder and distinguish it from second degree murder. The latter are homicides that are unplanned or impulsive even though they are intentional and with malice aforethought.

In short, deliberate, planned and purposeful killing is murder in the first degree; impulsive, unplanned killing is not.

Intentional murder is in the first degree if committed in cold blood and is murder in the second degree if committed on impulse or the sudden heat of passion.

A homicide conceived in passion constitutes murder in the first degree only if there is proof beyond a reasonable doubt that there was an appreciable time after the design was conceived, and that in this interval there was a further thought and a turning over in the mind and not a mere persistence of the initial impulse of passion.

Now an intentional killing may be murder in the second degree if premeditation and deliberation do not exist. Murder in the second degree is the unlawful killing of a human being by another with malice

but without purpose and intent to kill; or if committed with purpose and intent to kill, without premeditation and deliberation.

The essential elements of the offense of murder in the second degree, each of which the Government must prove beyond a reasonable doubt are as follows: first, that the defendant inflicted an injury or injuries upon the deceased from which the deceased died. Second, that the defendant at the time he so injured the deceased acted with malice.

As to the first point, before you may find the defendant guilty of homicide in any degree you must find the Government has proved beyond a reasonable doubt that the decedent did in fact die from the injries inflicted by the defendant.

Now as to the second point, as I have said, murder in the second degree is the unlawful killing of one human being by another with malice but without premeditation and deliberation. Malice is an essential ingredient or element of murder in the second degree but premeditation or deliberation are not essential elements. Malice implies a condition of mind which prompts one to commit an act willfully. It is not limited in its meaning to hatred, or illwill, or malevolence, but denotes a wicked and corrupt disregard for the lives and safety of others. Malice in the eyes of the law is a state of mind which shows a heart fatally bent on mission.

A killing under the influence of passion induced by insufficient provocation may be murder in the second degree. An accidental or unintentional killing constitutes murder in the second degree if the killing is accompanied by malice. Malice as an essential element of the crime of murder in the second degree may be either expressed or implied.

So if you find that the Government has proved beyond a reasonable doubt that the defendant inflicted an injury from which the deceased died, and the Government has proved beyond a reasonable doubt that the defendant acted with malice either expressed or implied, but without premeditation and deliberation, then you may find the defendant guilty of murder in the second degree.

If you find that the Government has proved beyond a reasonable doubt that the defendant inflicted an injury from which the deceased died but that the Government has failed to prove that the defendant acted with malice either expressed or implied when he injured the deceased, then you will consider whether the defendant is guilty of manslaughter.

Manslaughter is another included offense to the crime of murder in the first degree. Manslaughter is the unlawful killing of a human being without malice. For example, it may be such killing as happens as a result of a sudden quarrel, or in the commission of an unlawful act without any deliberate intention of doing any mischief at all.

If the killing is committed in the sudden heat of passion caused by adequate and sufficient provocation the crime is manslaughter rather than murder in the second degree.

In other words, if it is shown that both ample provocation and sudden passion existed at the time the factual act is committed, then the offense is manslaughter and not murder.

The term sudden passion as used here is meant to include rage, resentment, anger, terror and fear. The term provocation as used here which makes an offense manslaughter rather than murder must be adequate and must be such as might naturally induce a reasonable man in the anger of the moment to commit the deed. It must be such provocation as would have like effect upon the mind of a reasonable or average man causing him to lose self control.

As indicated, in addition to the great provocation there must be passion and hot blood caused by that provocation.

In order to reduce murder to manslaughter the provocation must be of such a degree as will cause an ordinary man to act on impulse and without reflection. In addition to great provocation there must be passion and hot blood caused by that provocation. A trivial or slight provocation entirely disproportionate to the violence of the retaliation is not adequate provocation to reduce the crime from second degree murder to manslaughter.

If you find that the defendant inflicted an injury to the deceased from which he died and that this injury was inflicted in a sudden heat of passion and hot blood caused by adequate provocation but without malice, bearing in mind the definition of malice that I have given you, you may find the defendant guilty of manslaughter.

You are instructed that voluntary drunkenness is never an excuse for crime. However, in all cases where specific intent is an element of the offense, that is, where the law requires there be a specific intent to commit a particular crime as in the case of murder in the first degree where there must be as actual intent to kill, it does become necessary for you to inquire as to the state of mind with which the defendant acts, and his drunkenness or sobriety is a matter of consideration in making such an inquiry. The question of drunkenness is not considered for the purpose of excusing the defendant, it is considered, if it exists, for the purpose of ascertaining whether or not he was able to form an intent to kill and deliberate and meditate over it.

The degree of the offense depends upon the question whether the killing was willful, deliberate and premeditated. And upon that question it is proper for you to consider evidence of drunkenness in order to determine whether the defendant's mind was capable of that deliberation and premeditation which is necessary to amount to murder in the first degree.

Therefore, if upon a consideration of the evidence in this case you find that at the time the fatal shots were fired the defendant was so intoxicated from drinking alcohol beverages as to have been unable to form the purpose or intent to kill the decedant, or having the capacity to form the required intent and purpose to kill, but lacking the ability to premeditate or deliberate over it because of drunkenness, or if upon a consideration of the evidence, you have a reasonable doubt with respect to these propositions, it will be your duty to find the defendant not guilty of murder in the first degree.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT WALTER, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 21,553
(Criminal 432-65)

Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING

Robert Walter, Jr., Appellant herein, by his attorney, respectfully petitions for rehearing respecting this Court's judgment dated October 25, 1968, and in support of this petition shows:

1. In seeking reversal of the judgment of the District Court, Appellant submitted, inter alia,

a) That the instructions were erroneous in that they did not submit to the jury the question whether there had been an unintentional killing resulting from an unlawful act either in its nature dangerous to life or constituting criminal negligence. That is, the instructions did not submit the issue of involuntary manslaughter.

b) That the instructions on excusable homicide were erroneous in that there was no charge with respect to the degree of negligence which constitutes criminal negligence and no definition of the type of unlawful act which will support an involuntary manslaughter conviction; and the District Court told the jury that death resulting from ordinary negligence would constitute crime.

2. Appellant submits that this Court, in stating that the charge to the jury included "the essential elements of ... manslaughter" and that "the essential questions of law were clearly outlined to the jury" (Opinion, pp. 2, 3), has overlooked or misapprehended the evidence of record. The instructions told the jury that "in order to reduce murder to manslaughter," the jury must find "great provocation" and "passion and hot blood." Appellant's testimony, in contrast, was not of "reason dethroned" by passion, but of absence of intent to kill or injure.

3. The holding of the Court, however, appears to be that, in any event, Appellant can have no grounds for appeal: "Plain error" cannot occur where a defendant is represented by "a capable trial counsel" who makes "a cold appraisal of his defense in the light of his years of broad experience" (Opinion, p. 3) and reaches "calculated decision[s]" as to trial tactics (Opinion, pp. 3, 4). Appellant submits that this holding misconstrues Rule 52(b) of the Federal Rules of Criminal Procedure.

4. It should not be relevant under Rule 52(b) whether the appellate court happens to know (or to surmise) that trial counsel has had years of experience, that his experience has been broad, or that he is capable of "cold" appraisal of the defense. The question is whether "substantial rights" of defendant have been affected. See United Brotherhood of Carpenters v. United States, 330 U.S. 395, 412 (1947). "Counsel's calculated decision" as to tactics (Opinion, pp. 3-4) is not controlling. In the Carpenters case, supra, defendants pleaded nolo contendere, surely a prime example of a tactical decision, yet the Supreme Court found plain error. And as this Court said in Green v. United States, No. 21,385, decided Nov. 1, 1968, p. 4: "... the responsibility for instructing as to the elements of the offense rests with the judge. Counsel should of course be alert to point to error he deems harmful, thus affording opportunity for correction, but in this special function of the judge the responsibility is not fully shared by counsel, who indeed may be laboring under the same mistaken view of the law."

5. Appellant submits that error in the instructions affected his substantial rights. The instructions told the jury to convict Appellant of some crime if they thought him guilty of so much as negligence, and at the same time ruled out involuntary manslaughter. The result was an erroneous conviction of murder in the second degree.

WHEREFORE, Appellant prays for rehearing.

Respectfully submitted,

Gary L. Cowan
1625 Eye St., N.W.
Washington, D.C. 20006
(638-5400)
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 1968, at Washington, D.C., I served the foregoing Petition for Rehearing by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to

United States Attorney for the
District of Columbia
Room 3136-C
United States Court House
3rd Street and Constitution Avenue, N.W.
Washington, D.C.

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REPLY BRIEF FOR APPELLANT

IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,553
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ROBERT WALTER, JR.,

Appellant,

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APPEAL FROM THE UNITED STATES
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Attorney for Appellant
(Appointed by this Court)

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Appellee.

REPLY BRIEF FOR APPELLANT

I. DENIAL OF APPELLANT'S MOTION FOR ACQUITTAL OF SECOND DEGREE MURDER

The Government and Appellant agree as to the standard which determines whether denial of Appellant's motion for acquittal as to second degree murder was erroneous. As this Court stated in Austin v. United States, _____ U.S. App. D.C. _____, 382 F.2d 129, 138 (1967), such a motion must be granted if the evidence, considered in the light most favorable to the

prosecution, "is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime." (See Appellant's Brf., p. 13; Govt. Brf., p. 13.)

The issue is whether a reasonable juror could accept the testimony of Mrs. Richardson as establishing guilt beyond a reasonable doubt. The Government's statement of evidence (Govt. Brf., p. 14) shows that her testimony was an essential part of the prosecution's case: It was she who testified that Mr. Tarrant Sr. did not attempt to seize the gun from Appellant, but that Appellant deliberately fired a fatal shot. (Tr. 24-25, 70, 77, 79, 278.)

Appellant submits for the reasons stated in his principal brief that the crucial part of Mrs. Richardson's testimony was inherently incredible. (Appellant's Brf., pp. 14-15.) Apart from her testimony, there is no proof of malice aforethought sufficient to overcome reasonable doubt. Evidence supporting inferences that Appellant loaded the gun and engaged in a "negligent pattern of behavior" (Govt. Brf., p. 14) would not suffice. Malice aforethought is more than negligence. It is a state of mind showing "a heart fatally bent on mischief and unmindful of social duties"; or "a condition of mind that prompts a person to do an injurious act wilfully to the injury of another." Fryer v. United States, 93 U.S. App. D.C. 34, 38, 207 F.2d 134, 138 (1953), cert. den., 346 U.S. 885.

II. FAILURE TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER

The Government contends that two sentences from the lengthy instructions given by the trial court were sufficient instructions on involuntary manslaughter. (Govt. Brf. 15; Tr. 291.) But these two sentences, unlike the instruction on circumstantial evidence given in the Howard case on which the Government relies (Govt. Brf., p. 16), did not embody "the minimum elements required for such a charge." Howard v. United States, ____ U.S. App. D.C. ____, 389 F.2d 287, 290 (1967). In the instant case, the trial court did not give the necessary explanation of "the full character of the unlawful act as an ingredient of involuntary manslaughter," United States v. Pardee, 368 F.2d 368, 373 (4th Cir. 1966); and the trial court did not fulfil its "responsibility of instructing the jury upon the essential elements of a crime," Barry v. United States, 109 U.S. App. D.C. 301, 302, 287 F.2d 340, 341 (1961).

Moreover, the trial court's brief reference to manslaughter as killing without malice and as killing "in the commission of an unlawful act" (Govt. Brf., p. 15) was completely obscured by instructions that followed. The trial court told the jury, without qualifying words, that "in order to reduce murder to manslaughter" there must be adequate provocation and heat of passion. (Tr. 292-293.) The instructions, in short, ruled out a manslaughter verdict other than voluntary manslaughter.

Finally, the Government contends that Appellant was not entitled to an instruction on involuntary manslaughter because the evidence "pointed only to an unintentional killing with malice" (Govt. Brf., p. 16); that is, to felony murder which was murder in the second degree because the felony committed - assault with a dangerous weapon - is not one of those specified in D.C. Code § 22-2401, the first degree murder statute (Govt. Brf., pp. 16-19).

The Government contends that Appellant's testimony constituted a confession of assault with a dangerous weapon. (Govt. Brf., pp. 18-19.) That is not the case. Appellant testified that he did not know the pistol was loaded; that his intent was not to do injury, but to warn away a man who had just given him a severe beating; and that he did not point the pistol at anyone or otherwise present it in a threatening way, but pointed it toward the ceiling, holding it high, trying to keep it out of reach. (Tr. 230-231, 260-261, 263, 265.) While assault with a deadly weapon need not include "a specific intent to inflict serious injury," simple assault must be present. Parker v. United States, 123 U.S. App. D.C. 343, 346, 359 F.2d 1009, 1012 (1966). Appellant did not confess an assault.

Assault under the D.C. statute, as at common law, is "an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using

actual violence against the person." Guarro v. United States, 99 U.S. App. D.C. 97, 99, 237 F.2d 578, 580 (1956), quoting Patterson v. Pillans, 43 App. D.C. 505, 506-507 (1915). Appellant testified, in effect, that he made no attempt to injure any person and had no intent to use violence.

The Government's argument means at most that the prosecution should have submitted a theory of felony murder to the jury. If Appellant is charged with assault with a deadly weapon, he is entitled to trial by jury. It would be a denial of that right for this Court, as the Government urges, to find Appellant guilty of that crime.

Finally, the Government's theory of felony murder is erroneous. It is the rule in this jurisdiction that "malice exists, sufficient to support a conviction for murder, where the killing results from the commission of a penitentiary offense, which is reasonably calculated to cause death or inflict serious bodily injury." Lee v. United States, 72 App. D.C. 147, 150, 112 F.2d 46, 49 (1940). This is the common law felony murder rule, with "penitentiary offense" substituted for "felony." And "the courts have held it to be essential in order to bring the case within this rule, that the slayer was engaged in some other felony, so distinct 'as not to be an ingredient of the homicide' itself." Perkins, A Re-examination of Malice Aforethought, 43 Yale L. J. 537, 562-563 (1934). Thus the better rule holds that assault with a deadly weapon, since it is an ingredient of homicide, cannot

be "relied upon by the state as an ingredient of a 'felony murder.'" State v. Branch, 415 P.2d 766, 767 (Ore. 1966).*/

III. THE INSTRUCTION ON EXCUSABLE HOMICIDE

It appears the Government is correct in pointing out that the trial court gave an instruction on accidental death submitted by defense counsel (Tr. 283), rather than the instruction prepared by the court (A Tr. 81, 83). (See Govt. Brf., p. 19.) As this Court stated in Weldon v. United States, 87 U.S. App. D.C. 113, 116, 183 F.2d 832, 835 (1950), an appellate court may refuse to consider a challenge to instructions which were given at the request of an appellant. This rule is applied so that one charged with crime may not lay a trap for the trial judge and then seek reversal if the trap succeeds. United States v. Donovan, 242 F.2d 61, 63 (2d Cir. 1957).

Appellant submits that in the instant case, no trap was laid. The situation was rather one of confusion. Lacking an authoritative decision by this Court, there was (and is) no clear source of correct instructions as to the degree of negligence which is criminal in homicide cases. Thus, Appellant's point should be decided. Even though an appellant would otherwise be barred

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*/ The Supreme Court of Oregon, in the Branch case, collects rulings in accord from New York, Arizona, and Missouri. (415 P.2d at 767.) The California court, while rejecting the "independent felony" test with respect to burglary, conceded that New York rule is "equally reasonable." People v. Hamilton, 362 P. 2d 473, 485 (1961).

from challenging an instruction because he requested it, the Court may nonetheless decide his point if it is an important point of law. Dennis v. United States, 341 U.S. 494,500 n. (1950) (Opinion of Vinson, C. J., and Reed, Burton and Minton, JJ.).

IV. EXCLUSION FROM THE JURY OF PERSONS OPPOSED TO CAPITAL PUNISHMENT

In opinions handed down after Appellant's brief was filed, the United States Supreme Court declined to accept, as a per se constitutional rule, the view "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." Witherspoon v. Illinois, 36 U.S. Law Wk. 4504, 4505 (June 3, 1968); Bumper v. North Carolina, 36 U.S. Law Wk. 4513, 4514 (June 3, 1968). And see Calloway v. United States, No. 21, 579 (D.C. Cir. July 12, 1968), note 4. The Government errs, however, in relying on these cases as completely dispositive of Appellant's argument respecting exclusion of prospective jurors. (Govt. Brf., pp. 19-20).

In addition to the constitutional point, Appellant submits that the question put to prospective jurors did not go to ability to render a fair verdict and therefore was erroneous under Long v. United States, 124 U.S. App. D.C. 14, 19, 360 F.2d 829, 834 (1966). (Appellant's Brief, pp. 28-29.) Moreover, the opinions of the Supreme Court relate to standards imposed on state courts by the federal Constitution; they do not hold that the federal courts may

not, or should not, apply a different or higher standard. By statute, it is the declared policy of the United States that juries be selected "from a fair cross section of the community." (Public Law 90-274, § 101, 28 U.S.C. § 1861) (effective in December 1968).

CONCLUSION

For the foregoing reasons and those submitted in Appellant's Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 1968, at Washington, D.C., I served the foregoing Reply Brief by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to

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